

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeem G. Kelly.

Electric Plant Board of
the City of Augusta, Kentucky

Project Nos. 12657-000
and -001

ORDER REJECTING APPLICATION FOR PRELIMINARY PERMIT
AND NOTICE OF INTENT TO FILE APPLICATION

(Issued May 18, 2006)

1. The Electric Plant Board of the City of Augusta, Kentucky (Augusta), has filed both an application for a preliminary permit to study, and a notification of intent to file an application for a license to construct and operate, the proposed Meldahl Hydroelectric Project in Kentucky. Because Augusta failed to timely commence construction of the project during a 10-year period under a previous license, and because there is competition from other entities seeking the opportunity to develop a project at the site, this order rejects both filings.

Background

2. In 1995, the Commission issued a license to Augusta for the Meldahl Project, to be located at the U.S. Army Corps of Engineers' Meldahl Locks and Dam on the Ohio River in Kentucky.¹ Pursuant to section 13 of the Federal Power Act (FPA),² the Commission granted Augusta the maximum allowable time to commence construction, but Augusta was unable to do so. Augusta then obtained legislation authorizing the Commission to grant up to three additional two-year extensions of the deadline. All three extensions were granted, causing the new deadline to be July 31, 2005.

3. In December 2003, we granted Augusta's application to amend the license to change the project from a conventional design to a design based on the placement of

¹ *City of Augusta, Kentucky*, 72 FERC ¶ 61,114 (1995).

² 16 U.S.C. § 806 (2000).

numerous microturbines within the dam. Augusta later concluded that the microturbine design would be far more costly than anticipated and, on April 29, 2005, applied to amend the license to return to the originally licensed project configuration.

4. In June 2005, Augusta notified the Commission of its intent to commence construction by the fabrication of draft tube liners. It then filed a project financing plan, which was rejected as patently deficient. That was followed by submission of a letter of intent regarding the sale of project power, a revised financing plan, and additional information purporting to demonstrate that construction by fabrication commenced by the deadline date. Augusta also moved for a stay of the license until the Commission acted on its pending amendment application.

5. On September 28, 2005, the Commission issued an order rejecting the revised financing plan, determining that Augusta had not timely commenced construction by equipment fabrication, denying its request for a stay of license, dismissing the amendment application, and issuing notice of probable termination of the license.³ Augusta timely requested rehearing.⁴

6. On March 1, 2006, we issued an order denying rehearing and terminating the license.⁵ We stated:

Once a license is issued, it is appropriate for the Commission to take reasonable steps to support the licensee's efforts to commence construction, and we have done so by affording the licensee multiple extensions of the commencement of construction deadline. That said, we act in the context of our authorities and responsibilities under the FPA, which include the provisions of FPA section 13, the purpose of which, as noted, is to require prompt development of a licensed project. We cannot change the facts that

³ *Electric Plant Board of the City of Augusta, KY*, 112 FERC ¶ 61,342 (2005).

⁴ On December 14, 2005, Augusta filed a request to defer action on the rehearing request, citing a December 5, 2005, document regarding project financing between certain cooperative utilities which were interested in purchasing a majority ownership interest in the project and the National Rural Utilities Cooperative Finance Corporation. On February 3, 2006, however, the cooperatives filed a letter with the Commission stating that they had been unable to reach agreement with the project developers on terms for their participation and have terminated their efforts in that regard.

⁵ 114 FERC ¶ 61,228.

the licensee has not commenced construction during the ten years it has had to do so, and that it has not submitted persuasive evidence that approval of its amendment application would enable it to acquire the funds, or a commitment of funds, to commence construction. We will therefore deny rehearing, and terminate the license. [⁶]

7. On March 3, 2006, Augusta filed an application for a preliminary permit to study a 77-megawatt (MW) project at the Meldahl site (Project No. 12657). Also on March 3, E.ON U.S. Hydro I LLC (E.ON U.S.), a wholly-owned subsidiary of E.ON U.S. LLC, an energy services company that owns and operates Louisville Gas and Electric Company, filed an application for preliminary permit to study a 93-MW project at the site (Project No. 12658). On March 29, the City of Hamilton, Ohio (Hamilton), which had previously competed unsuccessfully with Augusta for a license for the Meldahl site,⁷ filed an application for a preliminary permit to study a 114-MW Meldahl Project (Project No. 12667).

8. On April 17, 2006, Augusta filed in all three permit proceedings a notice of intent to file a license application for the Meldahl Project, accompanied by, among other things, a pre-application document, a request to use the Commission's traditional licensing process, and a request that the Commission waive certain of its regulations normally applicable to such an application.

Discussion

9. We firmly believe in the value of competition in licensing hydroelectric projects. As we stated in *The Yakima Nation v. Public Utility District No. 2 of Grant County, Washington*,⁸

[T]he electric power market is best served when competition is encouraged as widely as possible. Consistent with this general principle, we conclude that it is likewise in the public interest to encourage competition for

⁶ *Id.* at P 20.

⁷ The Commission found no significant environmental or economic differences among the proposals filed by Augusta, Hamilton, and a third competitor, the City of Vanceburg, Kentucky, and so issued the license to Augusta, whose application had been filed first. See 72 FERC ¶ 61,114 at 61,600.

⁸ 103 FERC ¶ 61,073 at P 22 (2003) (footnote omitted).

hydroelectric licenses. Competition can provide the impetus for license applicants to cut costs and to give greater consideration to the varying interests of stakeholders affected by the outcome of licensing proceedings. While it is typically not the case that there is more than one applicant for a new license for a given hydroelectric project, we nonetheless do not want to allow artificial restraints on competition.

10. This valuable competition can be stifled by “site-banking,” in which an entity that is not able to develop a proposed project ties up the project site, and thus prevents others from developing it. As we explained in *Idaho Power Company*,⁹ “the time limitations in section 13, prohibiting delays by licensees in constructing projects, and other provisions of the Act indicate a Congressional intent that water power resources be utilized in the best possible manner and at the earliest possible time.”¹⁰ Thus, we have generally declined to take steps, such as the issuance of stays, that effectively extend the time limit for commencing project construction, where the licensee has not shown an ability to move forward with a project.¹¹ As a result, where a licensee has not been able to develop a project, the project site has been released for competition from other entities.

11. Augusta had 10 years to develop the Meldahl Project and could not do so. Now it has filed both a preliminary permit application and a notification of intent to file a license application. All else being equal, Augusta’s permit application would prevail over those of Hamilton (because Augusta’s application was filed earlier) and over E.ON U.S.

⁹ 14 FPC 55, 68 (1955), *aff’d*, *Idaho Power Company v. FPC*, 237 F.2d 777 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924 (1956). *See also Idaho Power Company v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985) (Noting that the Commission found that if it allowed site-banking, “the site of that project would be tied up and other potential applicants who may have a need for power would be prevented from using it. FERC reasonably found that such tying-up of the site is contrary to the public interest and to the purposes of the Federal Power Act”).

¹⁰ *See Idaho Power Company*, 27 FERC ¶ 61,175 (1984), citing *Id.*

¹¹ *See, e.g., Ronald E. Rulofson*, 62 FERC ¶ 61,268 (1993); *Independence County, Arkansas*, 49 FERC ¶ 61,057 (1989) (concluding that despite licensee’s diligent preparations to commence construction, its inability to obtain a power sales contract was not an appropriate basis for a stay).

(because Augusta is a municipality and thus would receive a statutory preference over the private company).¹² In addition, if we accept a license application from Augusta, it may well trump the two other permit applications.¹³

12. We believe that it is in the public interest to allow other entities the opportunity to develop the Meldahl site, rather than once again reserving the site for some period of years to Augusta, which has hitherto not shown the ability to move forward with the project. We therefore reject Augusta's application for preliminary permit and its notice of intent, and will proceed to process the two remaining permit applications.

The Commission orders:

(A) The application for preliminary permit, filed by the Electric Plant Board of the City of Augusta, Kentucky, on March 3, 2006, in Project No. 12657, is rejected.

(B) The notice of intent to file a license application, filed by the Electric Plant Board of the City of Augusta, Kentucky, on April 17, 2006, in Project Nos. 12657, 12658, and 12667, is rejected.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹² Section 7(a) of the FPA, 16 U.S.C. § 800(a) (2000), states that, in issuing preliminary permits, the Commission shall give preference to applications by states and municipalities, if those applications are equally well adapted to those of their competitors to conserve and utilize in the public interest the water resources of the region.

¹³ Under the Commission's regulations, 18 C.F.R. § 4.37(a) (2005), the Commission will favor a license application to develop water resources over a preliminary permit application to study use of the same resources, unless the permit applicant substantiates that its plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region in question. We are unaware of any instance in which we have granted a permit application in competition with a timely license application.